United States District Court
District of Massachusetts
Worcester Division

Chamond Henderson
petitioner
v. civil action

United States of America
respondant No. 04-40119

Request to Amend 2255 motion

Comes now, petitioner, Chamond Henderson, and respectfully requests the Honorable court accept this Supporting Facts and Memorandum of law points as amendment to 2255 motion for consideration.

Petitioner also requests, as a courtesy to the respondant, the court extend time for response to this pleading.

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Suppoting facts, Memorandum of law points, Issues and Authorities in support of Motion to Vacate Sentence pursuant to 28 U.S.C 2255.

Comes now, Petitoner, Chamond Henderson, and respectfully moves this Honorable Court to vacate, set aside, or correct the sentence imposed herein, as grounds and reaso therefore, respectfully states;

Statement of Jurisdiction

The Jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 2255.

Statement of the Case

On FEb. 17, 1999, a grand jury returned indictments against the Petitioner along with two co-defendants. The parties then embarked on a lengthy journey through the discovery process. On July 13, 2000, the grand jury returned superceding indictments upon which Petitioner was tried. Those indictments alleged that the Petitioner conspired to possess cocaine base with the intent to distribute, and conspired to actually distribute cocaine base (count one), possessed with intent to distribute and did actually distribute cocaine base within 1,000ft. of a school on or about Oct. 19, 1998 (count two), and on or about Oct. 27, 1998 (count three) and on or about Nov. 3, 1998 (count four), and did aid and abet in the possession with the intent and actual distribution of cocaine base on or about Nov. 17, 1998 (count five).

One of the co-defendants, Kim Powers (hereinafter "Powers"), reached an accord with the government, and pled guilty with an agreement to testify against the other two. trial trans. p. 4-202. Discovery continued, however, on Nov. 21, 2000, new counsel was appointed for the Petitioner. Throughout March and April of 2001, the final flurry of pre-trial motions were heard and decided, and the government filed an information to enhance the Petitioner's sentence.

On April 23, 2001 the trial began. trial trans. p.1-1. It continued for six days, concluding with the jury's guilty verdict on April 30, 2001 trial trans. p. 6,1;128. Five witnesses testified, and forty-nine exhibits were entered into evidence. The Petitioner was sentenced on Sept. 19, 2001, and was committed to the custody of the Bureau of Prisons for 240

months.

The Petitioner filed a notice of appeal on Sept. 21, 2001. Thereafter, on Sept. 25, 2001, the government moved to dismiss the preceding indictments, which was allowed. The record was transmitted to the US Court of Appeals on Oct. 10, 2001. Direct appeal was filed March 22, 2002. Government's response was filed June 5, 2002. Reply brief filed June 20, 2002. US Court of Appeals for the 1st Circuit affirmed conviction on Feb. 14, 2003. On May 8, 2003 petition for cert. in the US Supreme Court. Petition for cert. was denied on June 16, 2003.

This is Petitioner's 1st 2255 motion. Petitioner has filed no other post-conviction motions in this court nor any other court pertaining to this matter. Petitioner does have a petition in the South Carolina Supreme Court attacking the prior 1991 conviction in which the 21 U.S.C 851 enhancement is predicated.

Petitioner is currently incarcerated at FCI Fort Dix, New Jersey 08640, Petitioner has been in continuous custody since his arrest herein, on or about March 15, 1999.

Argument

Point I :

Petitioner was denied effective assistance of counsel at pre-trial, trial, and at appeal stages in violation of Petitioner's Sixth Amendment right to effective assistance of counsel.

In Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court held that the sixth amendment right to counsel was essential to a fair trial so as to due process of law. It has long been recognized that the right to assistance of counsel is the right to effective assistance of counsel. Cuyler v. Sullivan 446 U.S. 335-344 (1980); Powell v. Alabama 287 U.S. 45 (1932).

Hence, the right to effective assistance of counsel is dependent on the right of counsel itself. See Wainwright v. Torma, 455U.S. 580,587-88 (1982); and it is axiamatic that appointed counsel falls within the ambit of the sixth amendment guarantee of effectvie assistance of counsel.

Also the right of counsel attaches "at or after the initation of adversary judicial proceedings against the defendant." U.S. v. Gouveia 467 U.S. 180(1984).

In Evits v. Lucy 469U.S. 387(1985), the Supreme Court held that effective assistance of counsel on first appeal was a right guaranteed by the due process clause and the sixth amendment.

In the case at bar, Petitioner was denied effective assistance of counsel at rhe pre-trial, trial, and on appeal. Petitioner was represented by three different counselors. At the early pre-trial (Peter Ettenburg), at pre-trial and trial (Peter Parker), and on appeal (John T. Ouderkirk Jr.).

In presenting this ineffective claim Petitioner is familiar with the U.S. Supreme Court's Strickland test that was enunciated in the case of Strickland v. Washington 466 U.S 688(1984). The prejudice rule that was articulated in Strickland and in subsequent cases, generally require the accused to show a reasonable probability that counsel's supposed error affected the result of the criminal proceeding in question. Strickland requires the accused to demonstrate that counsel's prformance was in fact deficient, and that counsel's errors prejudiced the defendant to the extent of being denied a fair trial.

Moreover, the Strickland court stated that the standard for evaluating counsel's performance is that of reasonably effective assistance according to the prevailing norms. Id at 688. That counsel's performance fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceedings. Id at 687-88.

The Strickland court has held that there must be a showing that but for counsel's alleged error, there was a reasonable probability that the results would have been different. A reasonable probability is one that is sufficient to undermine confidence in the outcome. U.S. v. Bagley, 473 U.S. 667 (1985).

Moreover, trial counsel did not present any defense that would have shown the government had failed to prove the existence of any agreement, expressed or implied, in which Petitioner had willfully, knowingly, and intentionally entered to become a member of any conspiracy. Nor did trial counsel present any defense that would have shown that the government had failed to prove that Petitioner had willfully, knowingly, and intention-

...-ally possessed with intent to distribute cocaine.

For trial counsel had a defense prepared and then did not use it. He only gave a boilerplate defense to Petitioner. Trial counsel made only one motion for judgment of acquital (Rule 29) for Petitioner. The trial court denied that motion. Aside from counsel's ineffectiveness, the outcome of Petitioner's trial would have been different. Had counsel been effective at Petitioner's trial, Petitioner would not have been convicted of all five counts of the offense herein. Nor would Petitioner been sentenced to 240 months in prison, that is 20 years under the prevailing Federal law, Petitioner is ineligible for parole, and must serve 85% of the 240 months.

Issue I:

During the pre-trial stage of this case counsel was ill prepared to argue motion to suppress fruits of warrantless search (dock# 99). Counsel neglects to interview or subpoena key eye witness in dispute of where wallet was seized from during Petitioner's arrest. Maureen Chamberlain and one of her co-workers were in the probation office prior to and during the arrest. P.O. Chamberlain and co-worker exited the office at some point after the initial arrest warrant was served.

P.O. Chamberlain and her co-worker work for the state and had no stake in the matter either way. Their eye witness account would have been paramount in the pursuit of the truth of the matter. Counsel did not interview or subpoena any of the people that were involved in the arrest to prepare for the motion hearing. In Hanes v. Dormire 240 F.3d 694, counsel failed to dispose or interview or subpoena any of states witnesses.

Here counsel had opportunity to get a third party's input to decide matter that was by the courts own words, "a truth contest..." motion hearing trans. p.6 ln.17-18.

Counsel was also not prepared to effectively argue the points of law. The court posed legal questions counsel could not answer, requiring an extention of six days to respond. Motion hearing trans. p. 49,55. Stating to the court, "You know, I don't have anything ready to hand to the court right now. I would like the opportunity to look carefully for that." Trial counsel should have been prepared to answer the courts on the matter knowing this motion hearing was pending an evidentary hearing. Trial counsel was appointed by the court to represent Petitioner. Trial counsel's performance was deficient; and Petitioner was prejudiced thereby.

"The 6th amend. requires not merely the provision of counsel to the accused in a criminal prosecution, but assistance which is to be for his defense, and thus, the core purpose of the counsel quaranty is to assure assistance at trial when accused is confronted with both the intricacies of the law and the advocacy of the prosecution; if no actual assistance for the accused's defense is provided, then the constituional quaranty has been violated" U.S Cronic, 466 U.S 648,655 (1984); U.S v. Ash, 413 U.S 300, 309 (1973) "the constitution's qurantee of effective assistance of counsel cannot be satisfied by mere formal appointment." Avery v. Alabama, 308 U.S 444,446 (1940).

Issue II:

During trial stage counsel's opening statement about Petitioner's music promotions business trial trans. p. 138 ln.5-12 which would have shed light on Petitioner's finances, was never supported by testimonial evidence. This testimony would have come from the 10+ witnesses that counsel decided not to call. In turn prosecution used that to say in closing argument Petitioner was "indeed a successful businessman, that is a succ-essful businessman in the business of crack cocaine." trial trans. p.6 line 23. This testimony would have also refutted prosecution's thecry of Petitioner using drug transaction money to retrieve pawned items namely $320 for a watch.

Counsel attempted to paint a picture of defense at onset of trial. Then abandoned that picture by not presenting a defense. Ouber v. Guarino 293 F3d. 19, 35-36, failing to fullfill a promise made in an opening statement, to call a witness or to present evidence has amounted to ineffective assistance of counsel.

Issue III:

After coming to the realization at trial that there was a problem of perjured testimony in the grand jury, counsel should have filed a motion to dismiss indictment. During agent Anderson 's trial testimony ,trial trans.p.2-57 it became apparent that he knew from the time the so called, "Sham sale" took place that CI Mozynski never made a hand to hand, face to face deal wiht "Butter" or anyone other than Powers.

At that point there should have been vigorous cross examination of agent Anderson to establish why he had gone before two previous grand juries and lied about what he saw with his own eyes. Instead of drawing out the reasoning why behind this falsification, trial counsel makes one mention of it then backs away from the issue. This was an opportunity for the petit jury to learn that agent Anderson, the governments most credible witness, had testified under oath before two grand juries and in light most favorable to the agent supported lies about material facts. Instead there was no credibility attack or impeachment by defense of agent Anderson.

Lastly, at trials conclusion counsel does not attack the indictment for use of perjured testimony. Nor makes mention of it in his Motion for acquital Rule 29 arguments. Defendants may dismiss indictments to remedy government misconduct, including vindictive prosecution, prosecutorial misconduct in grand jury proceedings... Bank of Novia Scotia v. U.S. 487 U.S 250,254 What sound defense strategy is not to attack or expose but to ignore a defect or violation once you know it exists. "The noun "strategy" is not an accused lawyers talisman that

necessarily defeats a charge of constitutional ineffectiveness... The strategy, which means "a plan, method, or series of maneuvers or strategems for obtaining a specific goal or result." Random House Dictionary 1298(rev. ed. 1975) must be reasonable. It need not be prticularly intelligent or even one most lawyers, would adopt, but it must be within the range of logical choices an ordinarily competent attorney... would asses as reasonable to achieve a "specific goal."

The goal was to protect Petitioner's right to a fundamentally fair trial. Allowing prosecution to use perjured testimony in order to obtain indictment without any attack on it was not reasonable by any competent attorney's standards.

Issue IV:

After months of pre-trial investigation and preparation for defense by previous counsel, in the 11th hour trial counsel decides not to call any witnesses or present any defense. Trial counsel feels the prosecutions case has not been proven beyond a reasonable doubt. Before the prosecution rested during a recess, trial counsel suggests to Petitioner he does not want to put up defense. This is the 1st mention of not using all the 10+ witnesses and following through with the defense planned on for months in pre-trial. He says, "the prosecutions case is weak and he believes his cross examination has been good enough to establish reasonable with the petit jury." Petitioner disputes trial counsel's opinion and arges that prosecutions story is the only side of the story being heard and there should be witnesses called and evidence presented on his behalf. Counsel disagrees and tells Petitioner to sleep on it.

Next court date prior to prosection resuming its case in-chief there was a recess. Counsel again strongly suggests no defense is necessary. Counsel and Petitioner go back and forth about the defense witnesses and sticking to the planned defense as opposed to relying on the incredible testimony of prosecution witnesses and overall weak case. Counsel is persuasive. Prosecution resumes its case shortly thereafter concludes and rests. Trial counsel notifies the court that defense will rest. In Harris v. Reed 894 F.2d 871,878; the court has held that Counsel's strategy not to call any witnesses... reliance on percieved weakness of prosecution's case was ineffective."

There was extensive investigation and preparation on facts of case and transactions. Particularly on the fact that Powers (cooperating government witness) used many other dealers during the time of alleged conspiracy. Additionally there was evidence that there was another individual with the same street name, "Butter" residing in the same block "Wachusett St." that two of the transactions of this alleged conspiracy took place. Evidence would have been produced that this other "Butter" has a criminal record of cocaine and crack sale convictions in the immediate area of the transactions of this conspiracy. Yet trial counsel did not want to provide petit jury with any defense testimony period. In Strickland 466 U.S. 690 the Supreme Court said "... despite the reasons for not calling these witnesses counsel's change of mind was not even a plausible option." There was no reason for counsel to believe charges would not be proven beyond a reasonable doubt without putting up some defense theory to support his claims from opening argument.

Issue V:

On March 20, 2001 a motion hearing took place to resolve many important pre-trial motions. This hearing had witness testimony, exhibits, oral arguments and ex parte motions resolved in front of trial court judge. At the end of the hearing it was clear to Petitioner this hearings transcript would be vital to defense in the future proceedings. Trial counsel orders that only the hearings witness testimony be transcribed by the court reporter. At the appeal stage Petitioner sought to obtain the hearing transcript and was only supplied with an excerpt of the hearing (witness testimony only). Appellate counsel, different from trial counsel, files direct appeal (March 2002) with issues that were dealt with at that March 20, 2001 motion hearing.

The U.S. 1st Circuit Court of Appeals denied Petitioner's direct appeal . In the court's opinion it states pertaining to the admissibility of the Identification testimony "We were somewhat hampered... We will do the best we can with what we have." U.S. v. Henderson 320F.3d 92,99 ft.nt.#2.
It is clear the appellate court deemed it necessary to see the entire record of the proceeding including all evidence admitted, witness testimony, oral arguments, judges comments and overall dialogue pertaining to the motions that were dealt with at the hearing. Appellate counsel did not diligently pursue the full record of the transcript. Though counsel had appeal issues that were fought in pre-trial at this hearing he never made an attempt to review the complete record for error.
The Supreme Court stated in Hardy v. U.S. 375 U.S 277(1964) "Indeed the most basic and fundamental tool of an appellate

advocate's proffession is the complete transcript... anything short of a complete transcript is incompatible with effective appellate advocacy. This is even true when trial and appellate counsel are one in the same." In this case the trial counsel is not the same as the appellate counsel. According to White v. State of Florida ND. D.C 939 F.2d 912,914 n.4, "...a seperate rule applies when a defendant has a different counsel for direct appeal. In that event, the absence of a substantial and significant portion of the record entitles such a defendant to a new trial even absent any showing of prejudice. U.S v. Selva 559 F.2d 1303,1305-1306.

The excerpt of this transcript is only 46 pages out of the complete 98 pages. The missing portion was not transcribed by district court reporter until April 2004. The Petitioner finally received the complete transcript after many requests from the court in May 2004 some 23 months after direct appeal was written. The information in the transcript dealt with not only the issues that were posed on the direct appeal but other issues that the appellate counsel did not have the opportunity to review for error. This includes fruits of warrantless search, Kel tapes and their transcripts, etc. In Mayer v. Chicago 404 U.S. 189 the Supreme Court said"due process requires that a defendant be given a reliable record of sufficient completeness to permit proper review of his claims." This did not happen in this case.

After reading US 1st Circuit Court of Appeals opinion on direct appeal. Petitioner inquired why appellate counsel did not supply court with the complete record. He replied, "I did supply the record and besides the court has the full record to review if necessary."

His reply, though somewhat ridiculous, was truthful. He believed he supplied the full record when he gave the motion hearing transcript excerpt. Since trial consel only asked the court to transcibe a portion of the hearing full review was impossible without further pursuit. Appellate counsel did not diligently pursue the remainder of transcript as did Petitioner to review it for errors. Especially after Petitioner made mention that complete transcript should be sought for review of possible errors made by court or trial counsel.

Appellate counsel's performance was deficient by the Strickland standard and was so prjudicial that the appellate court made mention of it in their opinion pertaining to the Identification issue. There were errors made at the hearing pertaining to the fruits of warrantless search (see warrantless search argument in this memorandum) The rest of the issue handled at this hearing were dealing with evidence to submitted at trial. The problem is appellate counsel never reviewed them with trained eyes. Thus Petitioner was prejudiced because at this point his untrained eye is not skilled enough to pick out errors and then argue them effectively.

Issue VI:

Appellate counsel put forth issues that were weak while ignoring the blatent constitutional errors; warrantless search, and perjured testimony in the grand jury proceeding. In Gray v. Greer 800 F.2d 644, appellate counsel ignored stronger issue and used a weaker one. Also see Clemmons v. Delo 124 F.3d 944.95 Then appellate counsel goes to change grounds of an already

preseved objection (pawnshop receipt). The pawnshop receipt should have been argued at the higher court on relevancy grounds. This would have gotten reviewat the harmless error standard rather than the more stringent plain error standard.

Petitioner has set forth six issues that the counsel's performance was deficient. Each is a factual account of ~~what~~ and meet both prongs of the Strickland test. In Mach v. U.S 635F.2d 20. 26-27, This circuit's higher court said, "...we accept petitioner's allegations as true except to the extent that they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.

The defective performance of the three different counselors has put the entire proceeding in jepordy. Each of the errors by themselves were prejudicial enough to render the entire proceeding unfair and a violation of Petitioner's due process. As stated in Murray v. Carrier 477 U.S 478, A single isolated error on the part of the counsel can render his assistance ineffective if the error is sufficiently egregious and prejudicial to the defense.

Petitioner was denied effective assistance of counsel at pre-trial, trial, and appellate stage of this process. Thus Petitioner's conviction was obtained in violation of his due process rights and his sixth amendment constitutional right to effective assistance of counsel. This court should vacate Petitioner's coviction.

Point II:

Prosecutorial misconduct; knowing use of perjured testimony in Grand Jury proceeding.

Long before the nascence of the Brady duty of disclosure, the Supreme Court had declared that the presentation of known false evidence in a criminal trial is incompatible with "Rudimentary demands of justice." Mooney v. Holohan 294 U.S 103,112 (1935); accord, eg., Pyle v. Kanas, 317U.S 213 (1942) Several years before announcing the Brady Rule, the court extends the prohibition of Mooney to the prosecutor's silent acquiescence when false testimony is presented, holding that "the same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinios, 360 U.S 264,269 (1959). Similarly, where a prosecutor manipulates the evidence to create a false impression before the grand jury, this constitutes prosecutorial misconduct and a corruption of the truth seeking function...albeit through somewhat different means. U.S v. Alzate, 47F.3d at 1110.

The controlling rule is that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." U.S v. Agurs 427 U.S 97,103 (1976) (footnote omitted). The prosecutor's knowing failure to disclose that testimony used to convict the defendant was false." stands on the same footing. U.S v. Bagley 473 U.S 667,678 (1985). This relaxed standard of materiality pertains because the presentation of or failure to correct false testimony "involves a corruption

of the truth seeking function of the trial process." Id.at 680 (citation ommitted). The "reasonable likelihood" standard that applies when false testimony is presented is the functional equivalent of the Chapman v. California, 386 U.S 18 (1967) constitutional harmless-error standard. U.S v. Bagley, 473 U.S at 679 n.9. Under that familiar rule, the inquiry is whether there is a "reasonable possibility" that the constitutional error "might have contributed to the conviction," and the burden is on the state "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." U.S v. Bagley, 473 U.S at 679 n.9 (quoting Chapman).

This, 2255, is the 1st time Petitioner is raising the perjured testimony in the Feb. 17, 1999 and July 13, 2000 Grand Juries(from here on known as grand jury I and grand jury II respectively). Before trial any other objections based on indictment waives such objection. Courts may however grant a defendant relief upon showing of good cause. US v. Marino 682 F.2d 449,454 n.3. Petitioner was denied effective assistance of counsel (see Point I isseue III).

The perjured testimony complained of happened at the grand juries, the motion hearing (March 20, 2001), and the trial. All of these false statements were made by angent Anderson the the lead case agent for the DEA in this case and the governments most credible and star witness. Each false statement pertained to a material fact of the case or an evidence issue. This In U.S v. Flaherty 668F.2d 566, this circuit's court has said, "Although not a precise rule...perjured testimony must be material to justify dismissal of indictment on basis of perjured testimony..." Agent Anderson's testimony fit that requirement.

Agent Anderson is the sole grand jury witness. His testimony is the only evidence that the grand jurors had to ascertain whether or not indictment was warranted in this case. He constantly gave hearsay evidence to the grand jury. In his capacity, as lead agent, he Wasn't involved in any of the transactions, set up of the transactions or particulars of the alleged conspiracy. Due to agent Anderson's percieved and literal, distance from the goings on of the alleged conspiracy, his testimony to the grand jury is riddled with, "according to the CI, from his debriefing, The CI said, etc..." This is where the problem lies. In Estrepa 471 F.2d 1132 the court held that lack of personal knowledge... nature of presentation to grand jury. Required dismissal. Stressing importance of avoiding undue reliance on hearsay before grand jury. The grand jurors could not have known when agent Anderson was speaking of his own eye witness account or simply relying what the CI told him in debriefing. The prosecutor's line of questioning ~~for the~~ and Anderson's in and out, up and down responses had to be confusing for the jurors to follow. This was used to the prosecutions advantage. The agent had no intention of revealing the complete truth to the grand jury. Also U.S v. Estrepa 471 F.2d 1132 at 1136 the court said, "the grand jury must not be misled into thinking it is getting eye witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed. U.S v. Leibowitz 420 F.2d 39,42.

The testimony in question pertains to the so called "sham sale" on Nov. 16, 1998. In Grand Jury I trans. p.14 ln.15, prosecutor begins asking agent Anderson what occured on Nov.

16, 1998, he describes the beginning of "the sham sale." Grand Jury I trans. P.15 ln.3"The CI and Powers are observed getting out of the vehicle." It is well documented in the agent Anderson DEA-6's, debriefing reports, and trial testimony that he was doing surveillance that night. He is the person who observes CI and Powers, the other officers mentioned do not arrive until after "sham sale" has transpired. Grand Jury I trans. p.15 ln.9-13, "from the debriefing, the CI stated that Powers and the CI met with "Butter." He handed, the CI handed Butter the $3,000. Butter handed him a newspaper containing a plastic bag with crack cocaine." Anderson speaks to grand jury as if he had no knowledge of what transpired during this part of the "Sham sale" He is only reciting what CI told him at debreiefing. Prosecutor and agent Anderson are falsely leading grand jury to believe agent Anderson had no personal knowledge of what took place at "sham sale." At this point prosecutor should have known what the agent actually ~~and~~ knew from his own personal eye witness surveillance of the "sham sale." and whether or not it was consistant with agent's police reports and the CI's statements. The introduction of perjured testimony constitutes a fundamental defect. According to U.S v. Biberfeld 957 F.2d 98,102, "If a prosecutor uses testimony it knows or should know is perjury, it is fundamentally unfair to an accused.

In Grand Jury II trans. p.9 ln.24 prosecutor begins saking agent Anderson what happened on Nov. 16, 1998 "the sham sale". Agent Anderson again describes the beginning of the "sham sale" p.10 ln.10 "he (CI) was observed going---walking into 6 Denny Street" Again agent Anderson is doing the surveillance himself when he says, "observed" he is the one that sess what happened.